No. 4202.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

Writ of Error to the District Court of the United States for the District of Montana.

BRIEF ON BEHALF OF HERBERT H. McGOVERN, JR.
Defendant in Error

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Great Falls, Montana.

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.....Clerk

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JURISDICTION

The first question to present itself is one of jurisdiction. The action is one at law. The cause was tried to the Court sitting without a jury (Tr. pp. 16, 31). The record fails to disclose that there was any written waiver of a trial by jury. The fact is that there was no written waiver made or filed. Counsel for Plaintiff in Error state that motion for trial without jury was filed and granted (Brief of Plaintiff in Error, p. 2). This statement is not supported by the record but is useful in determining the attitude of Plaintiff in Error as to a trial by jury.

Counsel for Plaintiff in Error assume and allege that the cause was tried by the district court under the provisions of section 24, paragraph 20 of the Judicial

Code (Brief of Plaintiff in Error, pp. 2, 71). If this contention is correct, no jury trial could be had as that section of the Judicial Code provides that all suits brought and tried under its provisions shall be tried by the Court without a jury.

It is the contention of the Defendant in Error that this cause was not tried before the district court under the provisions of section 24, paragraph 20 of the Judicial Code, which confers concurrent jurisdiction upon District Courts with the Court of Claims, but that the cause was tried before the court under its ordinary, usual and general jurisdiction; that since the cause was tried by the court without a jury and there was no written waiver of a jury trial as required by Section 649 Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 130, Comp. Stat. 1587) there is nothing for this Court to review, as under such circumstances only questions of law arising upon the process, pleadings or judgment, can be here reviewed, and none such arise.

Section 13 of the War Risk Insurance Act (Act of May 20th, 1918, C. 77, Sec. 1, 40 Stat. at L. 555, Comp. Stat. 514 kk, 9 Fed. Stat. Anno. (2nd Ed.) 1305) provides in part as follows:

> "That in the event of disagreement as to a claim under the contract of insurance betweeen the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the District in which such beneficiaries or any one of them resides."

The jurisdiction of the district court to hear and de-

termine this cause is conferred by the above quoted section. The question presented is whether the jurisdiction so conferred is the ordinary, usual and general jurisdiction of the district court, of which a trial by jury is an incident, or the special jurisdiction provided for by section 24, paragraph 20 of the Judicial Code wherein the district court sits as a Court of Claims without a jury.

This question was fully determined by the Supreme Court of the United States in *UNITED STATES v. PFITSCH,* 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 568, and in *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK,* 281 Fed. 754 (C. C. A. 2nd Cir.).

In the PFITSCH case, above, the question was presented to the Supreme Court under section 10 of the Lever Act (August 10th, 1917, Chap. 53, 40 Stat. at L. 276, 279; Comp. Stat. Sec. 3115 1/8 e, 3115 1/8 ii, Fed. Stat. Anno. Supp. 1918, pp. 181, 185). The case was tried before the district court without a jury. The government took the case to the Supreme Court by direct Writ of Error. Mr. Justice Brandeis in delivering the opinion of the Court stated:

> "The preliminary question arises whether this Court has jurisdiction on direct writ of error. The answer to be given to it depends upon the nature of the jurisdiction conferred upon the district court by section 10 of the Lever Act. If the jurisdiction is to be exercised in the manner provided by section 24, paragraph 20, of the Judicial Code, which confers upon the district court jurisdiction concurrent with the court of claims, a direct writ of error lies from

this court. *J. Homer Fritch v. United States,* 248 U. S. 458, 63 L. Ed. 359, 39 Sup. Ct. Rep. 158. If, however, the jurisdiction is the ordinary jurisdiction of the district court, the writ of error should have gone, in the first instance, from the circuit court of appeals, under section 128 of the Judicial Code. The nature of the jurisdiction of the district court is of importance, not only because of the question directly involved, but because the answer given to it will determine incidentally whether plaintiffs who proceed under section 10 are entitled to a trial by jury. For section 24, paragraph 20, of the Judicial Code, declares that 'all suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.' See *United States v. McGrane* ..... C. C. A. ..... 270 Fed. 761; *Filbin Corp. v. United States,* 266 Fed. 911."

The Court then entered upon a discussion of the provisions of the Lever Act. The jurisdictional part of that section provides that if any person is not satisfied with the President's award he should receive 75% of the award and for the balance "shall be entitled to sue the United States * * * and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." The Court next entered upon a discussion of the other section of the Lever Act which confer jurisdiction in other and different terms. Those sections particularly provide that persons dissatisfied with the President's award should be entitled to sue the United States in the manner provided by section 24, paragraph 20 and section 145 of the Judicial Code.

After a discussion of the legislative history of the Lever Act in which the Court points out that the juris-

dictional provisions of section 10 of that Act were inserted deliberately, the Court stated:

"It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn between granting for the adjudication of cases arising under this section concurrent jurisdiction in the court of claims and the district courts, without a trial by jury, or of establishing an exclusive jurisdiction in the district courts, of which the right to a jury trial is an incident. The first alternative was rejected, and the reason given for the rejection in the statement of the House conferees is that the proposed amendment would confer jurisdiction upon the court of claims. It is difficult to conceive of any rational ground for rejecting the clear and explicit amendment made by the Senate except to accord a trial by jury. All difficulties of construction vanish if we are willing to give to the words of section 10, deliberately adopted, their natural meaning.

"Furthermore, it is significant that this is not the only occasion upon which Congress has provided for suits against the United States exclusively in the District Courts. Section 1 of the War Risk Insurance Act of May 20, 1918, Chap. 77, 40 Stat. at L. 555, Comp. Stat. section 514 kk, provides that suits upon insurance policies 'may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any of them reside.' The act of March 4, 1919, chap. 125, section 3, 40 Stat. at L. 1348, Comp. Stat. section 3115 1/8 kk (3), which authorizes the President to requisition storage facilities for wheat, provides, in the words of section 10 of the Lever Act, that 'jurisdiction is hereby conferred on the United States district courts to hear and determine all such controversies.' And Section 2 of the Act of July 11, 1918, chap. 145, 40 Stat. at L. 898, Comp. Stat. 514 e, Fed. Stat. Anno. Supp. 1918, p.

907, permits suits against the United States on Marine insurance 'in the district courts of the United States sitting in admiralty.'

"A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation. In seventeen instances it definitely provided, by reference to the appropriate sections of the Judicial Code, for concurrent jurisdiction in the court of claims and the district courts, sitting as a court of claims. *In the four instances above set forth it conferred jurisdiction only on the district courts.* In four instances it conferred jurisdiction only on the court of claims. The established rule of statutory construction should lead us to give effect in every practicable manner to the distinctions which Congress has seen fit to make. Compare *Penn. Mut. L. Ins. Co. v. Lederer*, 252 U. S. 523, 533, 64 L. Ed. 698, 702, 40 Sup. Ct. Rep. 397. And where it designates a jurisdiction in which the trial will be with a jury instead of one where the trial will be by the court alone, it is our duty to give effect to its designation.

"The Writ of Error is dismissed for want of jurisdiction in this Court."

To the same effect is *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK,* Supra.

From the holding of the Pfitsch case the conclusion is absolute, that in suits, such as the instant case, brought under the War Risk Insurance Act, the District Court sits not as a Court of Claims under jurisdiction conferred by section 24, paragraph 20, of the Judicial Code, but in the exercise of its ordinary, usual and general jurisdiction. Such being the case, a jury trial was proper under section 566, Rev. Stat. (5 Stat.

at L. 726, 6 Fed. Stat. Anno. (2nd Ed.) 121, Comp. Stat. 1583), which provides in part as follows:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

As stated above the cause was tried by the Court sitting without a jury without a written waiver of a jury trial. The question which next presents itself is as to the effect on writ of error of the lack of such written waiver of trial by jury. Clearly the instant case is one at law and does not fall within any of the exceptions of Section 566, above quoted.

The decisions of the United States Courts are so numerous upon this question and the same has been passed upon so often by this court that it is needless to more than call the court's attention to the matter.

At common law a trial at law without a jury was unknown. When a jury was waived the Court was not sitting as a judicial body but merely as an arbitrator and his determinations as such were not subject to judicial review. The only questions which could be reviewed by the appellate courts were questions of law arising on the face of the process, pleadings and judgment.

This rule of the common law was modified by Congress by Section 649, Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.) 130, Comp. Stat. 1587) and Section 700 Rev. Stat. (13 Stat. at L. 501, 6 Fed. Stat. Anno. (2nd Ed.), 205, Comp. Stat. 1668), which

sections pertained exclusively to Circuit Courts. With the abolition of Circuit Courts, these sections were made applicable to disctrict courts, *LADD & TILTON BANK v. LOUIS A. HICKS CO.,* 218 Fed. 310 (C. C. A. 9th Cir.). Section 649 Rev. Stat. is as follows:

> "Issues of fact in civil cases in any Circuit Court may be tried and determined by the Court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the Clerk, a stipulation in writing waiving a jury. The finding of the Court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700, Rev. Stat. is as follows:

> "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

It has been uniformly and consistently held by United States Courts that unless a jury trial is waived in the manner provided by Section 649, Rev. Stat., that the District Court trying a cause without a jury sits as an arbitrator and not as a judicial body and that appellate courts are limited in their reviews to questions of law arising upon the process, pleadings and judgment.

BOND v. DUSTIN, 112 U. S. 605, 28 L. Ed. 835, 5 Sup. Ct. Rep. 296;

CAMPBELL v. BOYREAU, 21 How. 223, 16 L. Ed. 96;
ROGERS v. UNITED STATES, 141 U. S. 548, 35 L. Ed. 853, 12 Sup. Ct. Rep. 91;
CAMPBELL v. UNITED STATES, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398;
COMMISSIONERS OF ROAD IMPROVEMENT DISTRICT NO. 2 v. ST. LOUIS R. CO., 257 U. S. 547, 562, 66 L. Ed. 364, 42 Sup. Ct. Rep. 250;
RUSH v. NEWMAN, 58 Fed. 158, 160, 7 C. C. A. 136.

The same question has on numerous occasions been passed upon by this court.

DUNCAN v. ATCHISON, T. & S. F. R. CO., et al., 72 Fed. 808;
ERKEL v. UNITED STATES, 169 Fed. 623, 624, 95 C. C. A. 151, 152;
LADD AND TILTON BANK v. LOUIS A. HICKS CO., 218 Fed. 310.

The above cases all establish the rule of law to be that where no written waiver of a jury trial was made or filed as required by section 649 Rev. Stat. no question as to the admission or rejection of testimony or upon any other question of law growing out of the evidence can be considered by the appellate court. In order to merit consideration by the appellate court of questions allowed by Section 700, Rev. Stat., a strict compliance with the provisions of Section 649, Rev. Stat., is necessary.

The sufficiency of the finding of facts by the Court to support the judgment cannot be reviewed under such circumstances.

CAMPBELL v. UNITED STATES, 224 U. S. 99, 56 L. Ed. 684, 32 Sup. Ct. Rep. 398.

The fact that the United States is a party litigant does not in any manner effect this rule.

> *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK*, 281 Fed. 754, (C. C. A. 2nd Cir.).

Except in cases where the statute of limitations or laches is involved in a suit of a purely governmental matter, when the United States appears as a suitor, it fundamentally submits to the law and places itself on the same footing as other litigants and is not entitled to remedies which cannot be granted to any individual.

> *SHOOTERS ISLAND SHIPYARD CO. v. STANDARD SHIP BUILDING CO.*, 293 Fed. 707 (C. C. A. 2nd Cir.).

The case of *UNITED STATES v. NATIONAL CITY BANK OF NEW YORK* is of particular interest here because of the fact that it arose under section 10 of the Lever Act; because the government contended that no jury trial was allowable; and because it deals with consequences resultant upon the failure of the United States as a party litigant to waive a jury trial in proper manner. The court there first determined that a trial by jury was proper, citing the case of *UNITED STATES v. PFITSCH*, Supra. The court then stated:

> "When a case is tried in a federal court without a jury, and without a written stipulation waiving a jury trial, certain important consequences follow. The statutes of the United States provide that the trial of issues of fact in the District Courts in all causes except in equity, and cases of admiralty and maritime jurisdiction, and except as otherwise pro-

vided in proceedings in bankruptcy, shall be by jury. Rev. Stat. Sec. 566 (Comp. St. Sec. 1583)."

> The court then set out sections 649 and 700 of Rev. Stat. and continued: "It appears from what has already been said that at the opening of the trial of this case, when counsel for the Bank stated that he would waive the right to a jury trial, the Court at once suggested: 'Then you will have to have a signed stipulation that this may be tried without a jury.'
>
> Counsel for the government did not seem to grasp the significance of the suggestion. At any rate, while he insisted that the matter should be tried without a jury, he claimed no waiver was necessary, and the case went to trial without a jury and without a written stipulation waiving the jury. The result is that no question is now open to review in this Court on the writ of error, except it be one arising upon the process, pleadings or judgment."

It is respectfully submitted by counsel for the defendant in error that the following conclusions are imperative: That this is action at law; that it is such an action as allows a trial by jury; that no written waiver of trial by jury was filed but on the contrary counsel for Plaintiff in Error insist that they moved for a trial without a jury; that since no written waiver was filed as required by law the District Court was sitting as an arbitrator and the only questions which can be presented to this court for review are questions of law arising upon the process, pleadings, and judgment; and that the United States as a litigant is subject to the same rules as other litigants when it allows itself generally to be sued.

Counsel for Defendant in Error further respectfully submit that no questions of law arise upon the process,

pleadings, or judgment in this case and that, therefore, there is nothing for the court to review.

Assuming, however, that the theory of the Plaintiff in Error is correct and that this cause was tried before the District Court sitting as a Court of Claims under the provisions of Section 24, par. 20 of the Judicial Code, still this court is entirely without jurisdiction. If the District Court was sitting as a court of claims as contended by Plaintiff in Error the remedy was by direct writ of error from the Supreme Court of the United States and not from the Circuit Court of Appeals.

J. HOMER FRITCH v. UNITED STATES, 248 U. S. 458, 63 L. Ed. 359, 39 Sup. Ct. Rep. 158.

ARGUMENT AND BRIEF ON THE MERITS.

Counsel for Plaintiff in Error have, for the sake of convenience, grouped their assignments of Error in seven groups, lettered from A to G inclusive. In so far as possible counsel for Defendant in Error will arrange their brief accordingly.

ASSIGNMENTS OF ERROR—GROUP "A."

Group "A" includes only assignment of Error No. 22 (Tr. p. 22).

(Brief of Plaintiff in Error p. 25.) The mere statement of the assignment of Error No. 22 shows that this not a proper finding of fact but nothing more or less than counsel's conclusion of what the law is applicable to the same.

Counsel cites cases to show that this is not an ordinary contract of insurance such as issued by insurance companies. There is no contention on the part of the Defendant in Error that the Contract of Insurance with the Government is like in all respects to the ordinary insurance contract. In many features it resembles the contracts of insurance of fraternal and mutual companies and in many features it does not. We do insist, however, that in so far as they are applicable the ordinary rules and principles of law governing other cases of insurance do govern War Risk Insurance.

UNITED STATES v. GURNEY, 4 Cranch 333, 2 L. Ed. 638;
UNITED STATES v. SMOOT (Smoot's case), 15 Wall. 36, 21 L. Ed. 107;
UNITED STATES v. SMITH, 94 U. S. 214, 24 L. Ed. 115;
UNITED STATES v. BARLOW, 184 U. S. 123, 137, 46 L. Ed. 463, 469, 22 Sup. Ct. Rep. 468;
ELLIOTT v. UNITED STATES, 271 Fed. 1001.

In the case of *ELLIOTT v. UNITED STATES,* Supra, Judge Westenhaver at great length made applicable to the contract of War Risk Insurance, certain rules and principles of law governing fraternal and mutual insurance.

ASSIGNMENTS OF ERROR—GROUP "B."

Group "B" (Brief of Plaintiff in Error, p. 32) contains assignments of Error 12, 20 and 21. In assignments of Error 20 and 21, counsel assign as error the fact that the Court found that the Director of the Vet-

erans' Bureau, in defining Total and Permanent Disability, acted in excess of authority and that such definition was repugnant to and in contravention of the meaning and intent of said Act. It is sufficient for counsel for Defendant in Error to point out to the Court that no such finding was made and that no such opinion was expressed by the Court below. (Tr. pp. 289 and 294.)

Although counsel for the Defendant in Error refuse to accept the position counsel for the Plaintiff in Error are trying to force upon them, namely, of sustaining a finding which was never made, to-wit: That the Director acted in excess of authority in defining total and permanent disability and that such definition is repugnant to and in contravention of the meaning and intent of the War Risk Insurance Act, nevertheless, we wish to point out that counsel for the Plaintiff in Error have, in their brief, proven beyond a doubt that the Director of the Bureau of War Risk Insurance has exceeded his authority and that his definition of total permanent disability is repugnant to and in contravention of the War Risk Insurance Act. The regulation defining total permanent disability is regulation No. 11, Treasury Decision 20 (brief of the Plaintiff in Error, page 31), and in so far as it does define total disability reads as follows:

> "Any impairment of mind or body which renders it *impossible for the disabled person to follow continuously any substantially gainful occupation* shall be deemed, in Articles III and IV, to be total disability."

Counsel for Plaintiff in Error, in their brief (pages 46 and 47), set forth at length the history of this Act in the United States Senate and show that as the bill passed the House, Section 302 (1), Article 3, read as follows:

> "If and while the disability is total *so as to make it impractical for the insured person to pursue any gainful occupation,* the monthly compensation shall be in the following amounts * * *."

Counsel in their brief then continue:

> "But these words underlined" (words which appear in italics) "were stricken out in the Senate (Cong. Rec. Part VIII, p. 7697."

Thus we see that the Director, in defining total disability, has done nothing more or less than rewrite into the statute the words which the Senate advisedly and deliberately struck out of the Act. The only difference is that the Director substituted the word "impossible" for the word "impractical" in order to make sure that the disabled man would get the worst of it, and added, evidently with the same purpose in mind, the word "continuously."

The words "permanent" and "total" have no hidden meaning, they are plain, ordinary English words; are not doubtful or ambiguous and need no definition of the Director or any Administrative Department of the Government. When ordinary English words are used in a statute they receive, at the hands of the court, their ordinary and usual meaning.

OSBORN v. THE BANK OF THE UNITED STATES, 9 Wheat. 739, 6 L. Ed. 204;

DANCIGER v. COOLEY, 248 U. S. 319, 63 L. Ed. 266, 39 Sup. Ct. Rep. 119;
MOORE v. UNITED STATES, 249 U. S. 487, 63 L. Ed. 721, 39 Sup. Ct. Rep. 322.

When words which are not doubtful or ambiguous are used in a statute, the Courts will not consider, to say nothing about following, the definition and interpretation of an administrative department of the Government.

SWIFT AND C. & B. CO. v. UNITED STATES, 105 U. S. 691, 26 L. Ed. 1108;
UNITED STATES v. GRAHAM, 110 U. S. 219, 28 L. Ed. 126, 3 Sup. Ct. Rep. 582;
ROBERTSON v. DOWNING, 127 U. S. 607, 32 L. Ed. 269, 8 Sup. Ct. Rep. 1328;
WEBSTER v. LUTHER, 163 U. S. 331, 41 L. Ed. 179, 16 Sup. Ct. Rep. 963.

Assignment of Error 12 is to the effect that the Court erred in failing to find that the determination of the Bureau was final and not an abuse of powers granted to said Bureau under the War Risk Insurance Act.

The very wording of Section 13 of the War Risk Insurance Act (40 Stat. 555, 9 Fed. Stat. Anno. (2nd Ed.), 1305, Comp. Stat. 514 kk), precludes such an idea. That section, after conferring the power upon the Director to make rules and regulations not inconsistent with the provisions of the Act concerning the administration of the Act and to prescribe methods of presenting proof to the Bureau and make rules and regulations not inconsistent with the Act, continues:

"Provided, however, That payment to any attorney or agent for such assistance as may be required in

> the preparation and execution of the necessary papers shall not exceed $3 in any one case: and provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under Articles two, three and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

Surely if the decision of the Bureau were to be final, the right to suit, as granted by the express words of the statute, would be useless and the decision of the Director of the Veterans' Bureau could then be reviewed only where there was a manifest abuse of discretion or where he acted contrary to law. In either of these cases it would not have been necessary for Congress to give consent to sue the United States as in either case one so aggrieved would have had the right to bring mandamus proceedings against the Director.

The very fact that Congress has consented to permit suit against the Government of the United States on War Risk Insurance cases in such language as entitles plaintiff to a trial by jury as pointed out in the case of *UNITED STATES v. PFITSCH*, 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 569, decided by Mr. Justice Brandeis and concurred in by the entire Supreme Court, negatives the idea that the decision of the Director is final. As Justice Brandeis points out, the jurisdiction conferred by this statute is the ordinary jurisdiction of the District Court and it could not be

that and be a court of Review as contended for by counsel for the Plaintiff in Error.

ASSIGNMENTS OF ERROR—GROUP "C."

These assignments of Error have all to do with the sufficiency of the evidence to sustain the findings of the Court below and being similar in nature to assignments in Group "E," will be considered hereafter in this brief under the heading of Group "E."

ASSIGNMENTS OF ERROR—GROUP "D."

This Group contains assignments of Error 6, 7, 8, and 11, all of which assign as error the fact that the Court below refused to limit the Defendant in Error to testimony of the condition of the Defendant in Error subsequent to his discharge from the Army and prior to August 31, 1919, the date on which it is alleged his last payment of insurance premiums were made, and are all assignments alleging as error the admission of testimony without stating the full substance of the evidence admitted.

It is questionable whether any of these assignments are, and certainly assignment of Error 11, is not stated in conformity with the rules of this Court. (Rule 24, Paragraph 2, Subdivision b).

However, it must be clear to the Court that in order to recover Defendant in Error not only had to show that he was totally and permanently disabled on the date of his discharge or the date his insurance premiums ceased to be paid, but also was totally and permanently disabled during the time for which he seeks

to recover. In other words, he has to show that he was totally and permanently disabled from the date of his discharge until the date the action was tried. In as much as the question of sufficiency of evidence is to a certain extent involved in the consideration of this group particularly with reference to whether or not there was sufficient evidence to show that Defendant in Error was totally and permanently disabled from the date of his discharge to August 31, 1919, what we have to say later in this brief under the heading of Group "E," will be applicable to this group also to that extent.

ASSIGNMENTS OF ERROR—GROUP "E."

We have heretofore deferred the consideration of assignments of Error, Group "C" and that part of assignments of Error, Group "D" which has to do with evidential matters and the same shall be considered under this head together with assignments of error which are grouped under this head by Plaintiff in Error. Therefore, our brief, under this head, shall be given to the consideration of assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 14, 15, 16, 23, 24, 25, 26 and 27, all of which assign as error in substance the fact that the Court, on the evidence introduced, found the plaintiff to be totally and permanently disabled during all the time elapsing from the date of his discharge to the date of the trial below and that the policy of insurance matured therefore on the date of his discharge from the United States Army.

The evidence submitted below can best be grouped,

for orderly consideration, into three heads, Documentary Evidence, Lay Evidence, and Medical Evidence.

DOCUMENTARY EVIDENCE.

The Documentary Evidence introduced in the Court below consists entirely of records taken from the official files kept by the Bureau of War Risk Insurance in the case of Defendant in Error and are in large part certified photostatic copies of the reports made by doctors of their examinations of the Defendant in Error under authority conferred upon them by the Bureau and of the ratings made by the different boards acting under direction of the Director of the Veterans' Bureau. The character of these exhibits as official documents is shown by the testimony of L. A. Lawlor, counsel for the Government, who tried the case below (Tr. pp. 174-182).

All of said exhibits, particularly all of the rating sheets in the file, show that the Bureau itself and the Director thereof, has considered the Defendant in Error as suffering from the date of his discharge to the date of the trial below from two disabilities, Tuberculosis and Neuro-psychosis. (Exhibits Tr. 74 to 270.) To illustrate our point and relieve the court of the necessity of reading all these exhibits we believe that our contention is clearly shown by Exhibits Numbered 7 and 14, found at pages 104 and 167, respectively, of the transcript. Exhibit No. 7 (Tr. p. 106), shows that on December 6, 1921, the Bureau rated him on both a Tubercular disability and a Neuro-psychiatric disability

in varying percents but gave him a combined rating on the two disabilities of total temporary disability extending from the date of his discharge to the date on which the rating was made. This rating was later revised and the final result of the Bureau's numerous ratings is shown by Exhibit No. 14 above referred to (Tr. p. 167), which is the last rating Defendant in Error received prior to the trial of this case and which rating was made subsequent to the filing of the action and on March 14, 1923, and which rating gives him, on all the evidence in the file, a temporary total rating from the date of his discharge to October 10, 1922, and from October 10, 1922, a rating of total permanent disability and specifically states that their rating is based upon "(psychosis maniac depressive and psychoneurosis) service connected."

Counsel for Defendant in Error are, as was the Court below, bewildered and unable to see how the Government can contest the point that Defendant in Error was totally and permanently disabled from the date of his discharge and see no way to more forcibly express themselves than the words used by the Court below. *McGovern v. United States*, 294 Fed. 108 (Tr. 289, 292). After stating his conclusions that the plaintiff below, here Defendant in Error, was totally and permanently disabled from the date of his discharge, the Court very aptly says:

> "This view is fortified by the Bureau's judgment. Despite its error of interpretation, practically from the beginning it has rated him of total disability; and as time passed, examinations repeated and con-

dition unimproved, it at least indicates that its earlier determination of temporariness was mistaken and must yield to the logic of events and to a judgment that his total disability is permanent. With this, the Court agrees."

That these exhibits have not only evidential value but are in fact binding on the Government as admissions, as well as admissable in evidence, is pointed out, under our consideration of assignments of Error "F" hereinafter set forth.

LAY EVIDENCE.

Counsel will not assume to comment at length upon the testimony set out in the transcript. A mere casual review of the evidence will convince the Court that this man has been in a serious condition ever since the date of his discharge, and prior thereto, and beyond doubt has been totally and permanently disabled during all of that time. However, counsel for the Defendant in Error believe that it would aid the Court to understand, what is not at first clear from the transcript, the manner in which the testimony was introduced.

Owing to the critical physical condition of the Defendant in Error, at the trial below, counsel had to abandon their intention of calling him as their first witness, he being seized with one of the spells which in the testimony is variously described as fits and fainting spells (Tr. p. 236), and owing to the fact that the only other witness, who knew the condition of the Defendant in Error from the date of his discharge to the date of the trial, was not in attendance at the time the trial began, counsel for the Defendant in Error were

compelled to introduce testimony concerning his condition for the last two or three years, and later to supply to the defect by connecting it up with the service through the testimony of the Defendant in Error by his deposition which appears Tr. pages 214 to 231, and the testimony of H. H. McGovern, Sr., Tr. 48 to 54. Owing to the fact that all the other witnesses called prior to the last two named had testified at great length and described in detail the fits or fainting spells from which Defendant in Error suffered, these witnesses were not called upon to describe in detail that condition but merely testified to the fact that this condition was prevalent ever since the date of his discharge. The fact that the testimony is given by one of the parties to the suit and by his father is no reason why the testimony should be at all discredited.

MEDICAL TESTIMONY.

The Medical Testimony to some extent is necessarily involved in the documentary testimony because most of the documentary evidence consisted of examinations and reports of the Government Doctors who have examined this man. However, the transcript shows that the doctors called by the Government had either never seen the Defendant in Error or had examined him upon but one or two occasions and but for a few minutes. Dr. Josewitch saw him on but two occasions (testimony of Dr. Josewitch, Tr. p. 257, testimony of H. H. McGovern, Jr., Tr. 220). Dr. Little examined him on but one occasion although he made two reports of his

condition (testimony of Dr. Little, Tr. p. 238-257, testimony of H. H. McGovern, Jr., Tr. 226). Dr. Price examined him but on one occasion (Tr. 232). Dr. Stiffler never saw the Defendant in Error (testimony of Dr. Stiffler, Tr. p. 263). Dr. Michaels was brought to the trial by the Government and appeared as their witness but was not put on the stand by the Government. But his diagnosis is fully set forth in Defendant in Error's Exhibit No. XII, introduced at the trial below (Tr. p. 150). Dr. Bentley was called on behalf of the Defendant in Error. His testimony is to be given a great deal of credit for the reason that it shows that he, above all other Government doctors, has been familiar with his case, having seen him every day, and five and six times every day, for a period of five or six months, and for the further reason that he testified that he made a particular study of the Defendant in Error's case and for the additional reason that he is one of the doctors in the employ of the Government. His testimony is clear and to the effect that the Defendant in Error is and has been totally and permanently disabled.

ASSIGNMENTS OF ERROR—GROUP "F."

To this Group counsel for Plaintiff in Error have grouped assignments of Error 9 and 10 and have restated assignment of Error No. 11, which they also grouped in group "D." We have heretofore in this brief remarked that that assignment is not drawn in accordance with the rules of this Court, Rule 24, Par.

2, (b), and likewise commented in our brief in regard to group "D" upon the propriety of admitting the testimony objected to by the Plaintiff in Error in its assignment of Error No. 11. Assignment of Error 9 assigns as error the admission in evidence of the exhibits offered on behalf of the plaintiff for any other purpose than to show a disagreement between the Government and the Claimant. These exhibits were in fact all admissions made by the Bureau under authority granted to the Director thereof by the War Risk Insurance Act which said Bureau is empowered to examine, report, rate and make determinations on such examinations and reports and are all therefore public official documents and judgments of a special tribunal and are therefore competent evidence wherever material.

EVANSTON v. GUNN, 99 U. S. 660, 25 L. Ed. 306.

Counsel for Plaintiff in Error assign as error in its assignment No. 10 the fact that the Court erred in admitting testimony which had not previously been submitted to the Bureau. We submit that even though that were true, nevertheless, there is sufficient evidence shown to have been submitted to the Bureau to sustain the findings of the Court, namely, the exhibits offered on behalf of the Defendant in Error.

Plaintiff in Error prefaces its argument on this proposition with the statement that it is necessary to show a disagreement between the Bureau and the Claimant. With this we heartily agree and wish to

point out to the Court that Plaintiff in Error, in the answer which it filed in this action, has admitted the existence of a disagreement between the claimant (Defendant in Error) and the Bureau. (Tr. p. 9.)

This assignment of Error is predicated on the Government's false idea of the nature of the jurisdiction of the lower court. They deem it to be a court of review passing on the acts of the Bureau. The very wording of the statute itself precludes such an idea. Section 13 of the War Risk Insurance Act (40 Stat. 555, Comp. Stat. 514 kk) which confers jurisdiction to hear such cases upon the District Court of the United States, is set out in full on pages 74 and 75 of the brief of the Plaintiff in Error and the reading of that section as a whole shows conclusively that the idea of Congress was not to make the determination of the Director a final judicial determination. The sole thought actuating Congress was to prevent lawyers, attorneys, and agents from representing claimants before the Bureau and was to have the whole proposition, as far as its determination before the Bureau was concerned, tried as laymen would try it, reserving, however, a final, judicial, ultimate determination before a real court of law, deciding the whole question whenever the claimant and the Director could not agree. The very wording of this statute precludes the idea of the District Court being a court of appeals and being limited in its consideration to evidence previously submitted to the Bureau, because the jurisdiction conferred upon the District Court, by the words used in Section 13, is

the ordinary general jurisdiction of the District Court as is very forcefully pointed out by Mr. Justice Brandeis in the case heretofore cited by us. *UNITED STATES v. PFITSCH,* 256 U. S. 547, 65 L. Ed. 1084, 41 Sup. Ct. Rep. 569.

ASSIGNMENTS OF ERROR—GROUP "G."

Each assignment of Error in this Group has heretofore been considered in this brief as they are simply stating in another way, assignments of Error previously grouped and previously considered.

CONCLUSIONS.

It is respectfully submitted by counsel for Defendant in Error that:

(1) Since this cause was tried to the Court below under its ordinary, usual and general jurisdiction and without a jury, and since no written waiver of trial was made or filed as required by statute and since there are no questions of law arising upon the process, pleadings and judgment, there is nothing for this court to review;

(2) Even assuming that the contention of counsel for Plaintiff in Error is correct that this cause was tried by the Court below under the jurisdiction conferred by section 24, par. 20, of the Judicial Code (Tucker Act), still there is nothing to review in this Court as the remedy of the Plaintiff in Error was by direct writ of error from the Supreme Court of the United States;

(3) That regardless of the nature of the Writ taken or whence taken, no error appears in the record.

Respectfully submitted.

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Defendant in Error.